

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

**KENNETH CAMPBELL v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 91-S-831     J. Randall Wyatt, Jr., Judge**

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**No. M2006-02730-CCA-R3-CO - Filed November 15, 2007**

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The Petitioner, Kenneth Campbell, appeals the trial court's denial of his pro se petition for a writ of error coram nobis and, in the alternative, motion to reopen his post-conviction petition. The State has filed a motion requesting that the Court affirm the trial court's denial of relief pursuant to Rule 20, Rules of the Court of Criminal Appeals. We find that the State's motion has merit. Accordingly, the motion is granted, and the appeal is affirmed pursuant to Rule 20, Rules of the Court of Criminal Appeals.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed Pursuant to Rule 20, Rules of  
the Court of Criminal Appeals**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Kenneth Campbell, pro se, Pikeville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel, Criminal Justice Division, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

On December 4, 1991, the Petitioner was convicted of one count of first-degree murder and one count of theft of property. The trial court sentenced him to life imprisonment in the Tennessee Department of Correction. This Court affirmed the Petitioner's convictions and sentence, and the Tennessee Supreme Court denied his application for permission to appeal. *State v. Kenneth Campbell*, No. 01C01-9206-CR-00189, 1993 WL 86936, at \*3 (Tenn. Crim. App., at Nashville, Mar. 25, 1993), *perm. app. denied* (Tenn. July 6, 1993).

Subsequently, the Petitioner filed a petition for post-conviction relief, challenging the jury instructions at trial, which the post-conviction court denied. This Court affirmed the denial of the petition, finding that the trial court did not violate the Petitioner's due process rights by giving

incorrect jury instructions regarding premeditation. *Kenneth Campbell v. State*, No. 01C01-9409-CR-00321, 1995 WL 328862, at \*2-3 (Tenn. Crim. App., at Nashville, June 1, 1995). In 2003, the Petitioner filed a second petition for post-conviction relief under the Post-Conviction DNA Analysis Act of 2001, *see* T.C.A. § 40-30-301 (2006), requesting DNA testing on the bullet introduced at trial, which the post-conviction court dismissed. This Court affirmed the dismissal of the petition, concluding that, because the Petitioner had waived the issue by not including the trial transcript in the record and had already confessed twice to killing the victim, the purpose of his petition was to “delay the administration of justice.” *Kenneth I. Campbell v. State*, No. M2004-00589-CCA-R3-PC, 2005 WL 467161, at \*3-4 (Tenn. Crim. App., at Nashville, Feb. 22, 2005), *perm. app. denied* (Tenn. Oct. 10, 2005). In 2005, the Petitioner filed a third petition for post-conviction relief, alleging that the State suppressed exculpatory evidence and presented false testimony, which the post-conviction court summarily dismissed. This Court affirmed the dismissal of the petition, concluding that it was time-barred by the statute of limitations for filing post-conviction petitions and failed to meet any of the statutorily-recognized exceptions. *Kenneth Campbell v. State*, No. M2005-02895-CCA-R3-PC, at \*2 (Tenn. Crim. App., at Nashville, Apr. 20, 2006).

On October 19, 2006, the Petitioner filed a pro se petition for a writ of error coram nobis and, in the alternative, motion to reopen his post-conviction petition. In his error coram nobis petition, the Petitioner asserted that, at trial, the prosecution and Metro Police Department concealed and improperly used evidence, leading to an improper conviction and sentence. He claimed that he had since discovered new evidence that may have resulted in a different judgment had it been presented at trial. Specifically, the Petitioner stated:

Testimony was given by Officer William Merrill, that the [P]etitioner was armed with a .380 automatic firearm. No weapon was found, by the MPD or the de[te]ctives invol[v]ed in the case. Officer Merril[l] did testify as to finding a .380 shell casing and a projectile. The [P]etitioner has newly discovered evidence, that could not be discovered earlier, due to the false testimony of [O]fficer Merrill. The [P]etitioner asserts that the bullet used at his trial is a .38 bullet not a .380 bullet, these are two different types of ammunition. . . . Officer Merrill testifie[d] as to the projectile or bullet as though it was .380 caliber.

The trial court dismissed the error coram nobis petition, finding that “nowhere in the evidence submitted by the Petitioner other than his own argument is the caliber of the bullet mentioned.”

In his motion to reopen his post-conviction petition, the Petitioner again asserted that there was new scientific evidence establishing his innocence. He maintained the same argument as presented in the error coram nobis petition, adding that “[t]he .38 bullet was introduced [at trial] as the actual projectile, that killed the victim. If the victim was killed with a .38 [bullet] according to [O]fficer Merrill[’s] testimony, then the [P]etitioner has a claim of actual innocence.” The trial court dismissed the Petitioner’s motion, finding that “there is no evidence cited by the Petitioner which establishes that the caliber of the bullet differed from that of the shell casings, or that the caliber of

the bullet was 0.38.” The Petitioner filed a timely notice of appeal to this Court on December 4, 2006.

On appeal, the Petitioner maintains that he has discovered new evidence that the prosecution and Metro Police Department concealed at trial. Thus, he argues that the trial court erred in summarily dismissing his error coram notice petition. Though he does not specifically address the dismissal of his motion to reopen his post-conviction petition on appeal, we will address that as well because the State raised it in its brief.

Tennessee Code Annotated section 40-26-105 governs writ of error coram nobis petitions. It states:

The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

T.C.A. § 40-26-105(b) (2006). The Tennessee Supreme Court has asserted that “[t]he writ of error coram nobis is an extraordinary remedy known more for its denial than its approval.” *State v. Vasques*, 221 S.W.3d 514, 524 (Tenn. 2007) (quoting *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999)). A petitioner must file an error coram nobis petition within one year after the judgment of the trial court becomes final. T.C.A. § 27-7-103 (2006); *Mixon*, 983 S.W.2d at 671. This one year statute of limitations may be tolled only when necessary not to violate due process requirements. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001).

A petition for a writ of error coram nobis should contain the following four items: (1) the grounds and nature of the newly discovered evidence; (2) why admissibility of this evidence may have resulted in a different judgment had it been presented at trial; (3) that the petitioner was without fault in failing to present the evidence at the appropriate time; and (4) the relief sought by the petitioner. *State v. Hart*, 911 S.W.2d 371, 374-75 (Tenn. Crim. App. 1995).

We initially note that the Petitioner filed his error coram nobis petition nearly fifteen years after the judgment of the trial court became final. Even if the one-year statute of limitations has been tolled, we find that the Petitioner has not presented any new evidence. He has not provided proof of the caliber of the bullet or that the caliber of the bullet was any different than that of the shell casing and firearm. Therefore, we affirm the trial court’s dismissal of the Petitioner’s error coram nobis petition.

Tennessee Code Annotated section 40-30-117 governs motions to reopen post-conviction petitions. It states:

A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

- (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
- (2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
- (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
- (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a)(1)-(4) (2006).

As noted above, the Petitioner alleges that he has discovered new scientific evidence establishing his innocence. While this is a cognizable ground for filing a motion to reopen a post-conviction petition, we again find that the Petitioner has discovered no new evidence in this case. He has merely developed his own theory, without any valid proof to back it up, that the caliber of the bullet differed from that of the shell casing and firearm. Because the Petitioner has not asserted any of the other narrow grounds for reopening his post-conviction petition, we affirm the trial court's dismissal of the Petitioner's motion.

Accordingly, the State's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

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ROBERT W. WEDEMEYER, JUDGE